

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For The Period
From October 1, 1960
Through December 31, 1960
VOLUME 101

MACDONALD GALLION, Attorney General



T. O. "Tillie" Walker

QUARTERLY REPORT
of the
ATTORNEY GENERAL

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Volume No. 101

**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF
ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from October 1, 1960, through December 31, 1960, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

MACDONALD GALLION
Attorney General

MACDONALD GALLION
Attorney General
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Administrative Assistant
Assitant Attorneys General

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OPINIONS

October 3, 1960

Honorable Roy O. Hill
Clerk, Circuit Court
Houston County
Dothan, Alabama

Clerks of Circuit Courts — Costs and Fees — Houston County.

1. The provisions of Act #741, Acts of 1957, have application to criminal cases filed in the Houston Law and Equity Court.
2. In civil cases filed in the Houston Law and Equity Court in which the amount in controversy does not exceed one hundred dollars the costs shall be the same as that allowed in justice court.
3. In civil cases filed in the Houston Law and Equity Court in which the amount in controversy exceeds one hundred dollars the costs shall be the same as that allowable in the circuit court.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of November 7, 1958 is as follows:

"The Houston Law and Equity Court was created by Local Act found on page 226 of Local Acts of 1947. In the Act creating the court, the clerk of the Circuit Court is made clerk of the Houston Law and Equity Court at a fixed salary. The Court is created in lieu of County Court and with civil jurisdiction in matters where the matter or sum in controversy does not exceed \$1,000.00.

"The cost in criminal cases of which justices of the peace have final jurisdiction is the same as in Justice of the Peace Courts and in other criminal cases the cost is the same as in County Court. In civil cases, where the amount in controversy does not exceed \$100.00, the cost is the same as in Justice of the Peace Court and in other cases the cost is the same as in Circuit Court.

"In Act No. 741 approved September 26, 1957, Section 1 reads:

"In all criminal and quasi criminal cases docketed in County Courts, LAW AND EQUITY COURTS or courts of like jurisdiction in the State of Alabama where the CIRCUIT COURT CLERK is ex-officio clerk of said court, the following schedule of costs shall be taxed for said clerks:

"(The 12 different fees for different services are then set up').

"By numbering these fees from one to twelve, the 4th, 5th and 6th fees could not possibly apply to this court as no case originating by indictment can be docketed in said court.

"Please advise if I am entitled to charge fees for the benefit of the clerk under this scale of fees, excepting Nos. 4, 5, and 6. If your answer to this question is yes, please advise further if, in addition to such fees, should I also charge the regular Justice of the Peace fees that I now charge.

"In Act No. 740 approved September 26, 1957, Section 1 reads in part as follows: '. . . for filing suit where the amount in controversy does not exceed one hundred dollars, or is not otherwise provided, six dollars'. Please advise if this fee should be charged for the benefit of the clerk in HOUSTON LAW AND EQUITY COURT cases in suits for not more than one hundred dollars."

In your letter of November 7, 1958 addressed to my predecessor in office and set out above, you make certain inquiries concerning the costs and fees which you should collect for your services as Ex-Officio Clerk of the Houston Law and Equity Court commencing with your new term of office as Circuit Clerk of Houston County on January 20, 1959.

In such letter you point out that the Houston Law and Equity Court, in its original form, was first created by Act No. 315, Local Acts of 1947, page 226, and subsequently amended by Act No. 208, General & Local Acts of 1949, page 295. Such court is a court of limited jurisdiction established in lieu of the County Court of Houston County and in your capacity as Circuit Clerk of Houston County you serve as clerk of this court in an ex-officio capacity.

Regarding costs taxable in such court, it is provided by Section 7 of Act No. 315, supra, that, among other fees, the following shall be taxed for the use of the county:

"* * * 1) in each civil action at law, if the sum in controversy does not exceed one hundred dollars (\$100), the same as in justice courts; 2) in every other civil action at law, the same as in the circuit court; 3) in each equity case, the same as in the circuit court; 4) in each criminal case involving an offense of which justices of the peace have final jurisdiction, the same as in justice courts; 5) in every other criminal case, the same as in county courts. * * *"

You next make reference to Act No. 741, Acts of 1957, page 1170, and inquire as to whether or not the schedule of costs allowed clerks of such inferior courts as found set out in such act would have application to the Houston Law and Equity Court rather than that schedule of costs quoted above as found in Act No. 315, supra.

As indicated, Act No. 741, *supra*, provides for a fixed amount of costs for clerks of the circuit courts who are ex-officio clerks of county courts, law and equity courts and courts of like jurisdiction in Alabama in criminal and quasi-criminal cases. Such act contains a listing of some twelve set fees or items of cost which are allowable to such clerks under the different situations outlined. This particular schedule of costs was adopted by the 1957 Legislature and is one of a series of legislative enactments by which the circuit clerks of the state now receive a set or specific fee for their services in any particular case, conditioned upon the circumstances surrounding such individual case. This system of fees or costs replaces the multiple fees formerly received by clerks for their services in criminal cases. This particular act, Act No. 741, *supra*, has application to those criminal or quasi-criminal cases docketed in a county court, law and equity court or court of like jurisdiction when the circuit court clerk serves as ex-officio clerk of the inferior court in question. From my review of the acts relating to the Houston Law and Equity Court, I am clearly of the opinion that it is such a court as would fall within the purview of Act No. 741, *supra*. As I have pointed out, the Houston Law and Equity Court is established in lieu of the county court and, likewise, is designated as a law and equity court for the county. Too, Section 2 of Act #741, *supra*, is to the effect that:

“The provisions of Section 87 of Title 11, Code of Alabama 1940, and all laws and parts of laws, general, special or local, in conflict with this Act are hereby repealed.”

Section 4 of such act also provides that:

“After its passage and approval this Act shall become effective in each county at the expiration of the term of the incumbent circuit clerk and shall apply to or affect cases filed after such date.”

In my opinion, the above-quoted provisions of Act #741, *supra*, serve to repeal those provisions of Act #315, *supra*, inconsistent therewith. Under these conditions, I feel that there can be no doubt but what the provisions of Act No. 741, *supra*, would be applicable to the Houston Law and Equity Court.

Having arrived at this conclusion, it is my opinion that, in those criminal and quasi-criminal cases docketed in such court, there should be taxed in such cases for the benefit of the clerk of such court those fees or items of cost applicable under the schedule established by Act No. 741, *supra*. I further feel that this set fee provided for by Act No. 741, *supra*, would be the only fee to which the clerk would be entitled for his services in the particular criminal case and that he would not be allowed any other or further fees for his services. Consequently, I advise that the schedule of fees provided for by Act No. 741, *supra*, in criminal and quasi-criminal cases would have application to the Houston Law and Equity Court rather than those fees provided for by Act No. 315, *supra*.

Turning next to the matter of fees or costs allowed the clerk for his services in civil actions in this court, I would first make reference to the provisions of Act No. 315, supra, which I have quoted above. Reference to this quoted portion of Act No. 315, supra, reveals that in civil actions at law, if the sum in controversy does not exceed one hundred dollars, the cost shall be the same as that allowable in justice courts while, on the other hand, in all other civil actions at law the cost allowable shall be the same as that in circuit courts. In your inquiry you make reference to Act No. 740, Acts of 1957, page 1169, and inquire as to whether or not the schedule of fees there set out would have application to services performed by the Clerk in the Houston Law and Equity Court.

Reference to the aforementioned Act No. 740 will reveal that the schedule of fees there provided for has application to services performed by clerks in the circuit court and would not have application to services performed by circuit clerks when acting in their capacity as ex-officio clerks of inferior courts. I do not find any new legislation whereby a different set of fees or costs is provided for the services rendered by clerks in their ex-officio capacity in civil matters. Consequently, I advise that in those civil actions at law disposed of in the Houston Law and Equity Court, if the amount in controversy be less than one hundred dollars, you should continue to collect the fees now provided for by Act No. 315, supra, that is, the same fees as are allowable in justice courts. On the other hand, if the amount in controversy exceeds one hundred dollars, it is provided by Act No. 315, supra, that the cost shall be the same as that allowable in the circuit court. Under these conditions, the provisions of Act No. 740, supra, would become applicable and, insofar as the costs and fees of the clerk are concerned, the schedule provided for by Act No. 740, supra, would apply and you would receive your costs and fees on the basis there set out.

I trust that the above gives answer to your inquiries and if I can be of further service, please advise.

Very truly yours,
MACDONALD GALLION
Attorney General

October 3, 1960

Hon. Macon L. Weaver
Circuit Solicitor

Twenty-third Judicial Circuit
Huntsville, Alabama

Solicitors — Warrants — Words and Phrases — Juvenile Court — Extradition.

1. Act No. 130, Acts of Alabama 1951, page 357 (Title 13, Section 229 (3), 1955 Cumulative Pocket Part, Code of Alabama 1940) authorizes the various solicitors of the State of Alabama to act in limited capacities in taking affidavits and issuing warrants of arrest made returnable to a court having jurisdiction of the cause, and having such powers are magistrates exercising certain judicial functions for limited purposes.

2. A solicitor does not have authority to take affidavit and issue warrant of arrest in peace proceedings.

3. A solicitor has authority to take affidavit and issue warrant of arrest returnable to the proper court in cases arising under Title 34, Section 90, Code of Alabama 1940.

4. A solicitor has authority to take affidavit and issue warrant of arrest in cases arising under Title 13, Section 366, Code of Alabama 1940.

5. A solicitor is not authorized to take affidavit and issue warrant in cases arising under Title 15, Section 60, Code of Alabama 1940.

6. An affidavit and warrant of arrest issued by a solicitor in a felony case is sufficient to support an application to the Alabama Governor for extradition proceedings when defendant has fled to another State.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of September 8, 1960, is as follows:

"For the purposes of clarification and guidance of the Courts in this Judicial District in Criminal matters, I have been asked by the Presiding Judge, Honorable Elbert Parsons to present to you for an opinion, several questions.

"In this Circuit, all warrants of arrest are issued by the Circuit Solicitor or one of his Deputies, the affidavits to support said warrant are taken by the same person, i. e., Circuit Solicitor or one of his Deputies. This procedure is followed under authority of Title 13, Section 229 (3) Code of Alabama 1940 as amended (Pocket Part).

It was a rule of the Court here for many years prior to the enactment of this statute that the Clerk not to issue a warrant until the Solicitor reviewed the case and authorized the issuance of the warrant.

"The questions to which an opinion of the Attorney General is requested are as follows:

"1. Does Title 13, Section 229 (3) Code of Alabama 1940 as amended along with the opinion of the Court of Appeals in *Hollaman vs. State*, 74 Southern 2nd 612, wherein the courts rendered its construction of the statute make a Solicitor by whatever name he is called, Circuit, Deputy, County, a magistrate as that term is defined in *Blacks Law Dictionary*, 'A magistrate is an officer having power to issue warrants for the arrest of a person charged with a public offense.'

"2. Does the authority contained in Title 13, Section 229 (3) Code of Alabama as amended make a Solicitor a magistrate under the definition found in Title 15, Section 399, Code of Alabama 1940 as amended so as to give a Solicitor authority to take affidavits and issue warrants of arrest in peace proceedings.

"3. Can a Solicitor take affidavits and issue warrants of arrest in cases arising under the provisions of Title 34, Section 90, Code of Alabama 1940 as amended when the jurisdiction of the offense is in the Juvenile or Domestic Relations Court or in the Probate Court.

"4. Can a Solicitor take affidavits and issue warrants of arrest in cases arising under Title 13, Section 366, Code of Alabama 1940 as amended.

"5. Can a Solicitor take affidavits and issue warrants of arrest in cases arising under Title 15, Section 60, Code of Alabama 1940 as amended (fugitive from justice).

"6. A. Will an affidavit and a warrant of arrest made before and issued by a solicitor in a felony case be sufficient to support an application for extradition of a felon who has fled to another state.

"B. Is a Solicitor a magistrate so as to comply with the provisions of Title 15, Section 71, Code of Alabama 1940 as amended.

"Your thorough study of the questions set out above and your opinion as to each will be very helpful to the administration of justice in the 23rd Judicial Circuit and the State of Alabama."

Your inquiries numbered 1, 3, 4, 6A and 6B are answered in the affirmative. Your inquiries numbered 2 and 5 are answered in the negative.

In answer to your inquiry numbered 1, you are advised that according to the quoted definition from *Black's Law Dictionary*, the various solicitors, circuit, deputy, county, or other solicitor by whatever name called, are magistrates for limited purposes only. The various

solicitors or prosecuting officers referred to in Title 13, Section 229 (3), 1955 Cumulative Pocket Part, Code of Alabama 1940, which is Act No. 130, Acts of Alabama 1951, page 357, according to a definition in Black's Law Dictionary, do have the power to issue warrants for the arrest of a person charged with a public offense. Act No. 130, Section 229 (3), *supra*, provides as follows:

"Power to take oaths in support of complaints and issue warrants.—Every circuit solicitor, deputy circuit solicitor, assistant deputy solicitor, county or other solicitor by whatever name called within the circuit, county, or other territory for which he is elected or appointed shall have the power to take oaths in support of complaints and to issue warrants in all criminal cases, provided, that such warrants shall be made returnable to a court having original jurisdiction of the offense charged.

"Provided that this section shall not apply to counties which comprise one entire circuit with more than two and less than five circuit judges."

It is obvious that the solicitors therein named are authorized by the legislature and invested with the power to take an affidavit or sworn complaint and to issue a warrant of arrest thereon "in all criminal cases." The warrant of arrest, together with the sworn complaint or affidavit, is made returnable to a court having original jurisdiction of the offense charged. A solicitor's power to take an affidavit and issue a warrant of arrest is limited to those particular acts. He is not authorized to hold a preliminary hearing and try the case. The officer executing the warrant of arrest would return the warrant and the affidavit to the court named in the warrant and the defendant would be there tried upon the affidavit taken by the solicitor. It is, therefore, apparent that it can be said that the various solicitors are empowered to exercise certain judicial functions. Those judicial functions are limited and it is stated in **Holloman vs. State**, 37 Ala. App. 599, 74 So. 2d 612:

"While the ascertainment of probable cause upon which to issue a warrant of arrest involves the exercise of a judicial function, as distinguished from merely administrative or ministerial powers, yet the legislature may commit such functions to ministerial officers because it is not final. (Citing cases). This being so, it is clear that the solicitor's complaint in this cause was supported by a proper affidavit."

To say that the various solicitors are magistrates does not imply that they have all of the powers of a magistrate but only those limited powers conferred upon them by Act No. 130, *supra*. The definition of "magistrate" in Black's Law Dictionary, in addition to the definition quoted in your question, contains other definitions of this term. For example, a magistrate is defined in this work as "a public officer belonging to the civil organization of the State, and invested with powers and functions which may be either judicial, legislative or executive,"

and when it is said that a solicitor is a magistrate it is meant that he may exercise certain judicial functions, the taking of an affidavit and issuing of a warrant of arrest returnable to a court. His judicial functions are limited to those acts.

Your inquiry numbered 2 has been answered by an informal opinion of this office under date of April 17, 1956, addressed to Hon. Jack Livingston, Attorney at Law, County Solicitor, Centre, Alabama. In this opinion this office held that the solicitor was not authorized by Act No. 130, supra, to issue a warrant in peace proceedings, prescribed in Title 15, Section 399, et seq., Code of Alabama 1940. This opinion was based upon the reasoning that Section 229 (3), supra, applied to "all criminal cases" and that the legislature did not intend to confer upon the solicitor authority to take affidavit and issue warrant of arrest in peace proceedings, since such proceedings is not a criminal case in the sense used by the legislature in Section 229 (3), supra.

It is my opinion that your inquiry numbered 3 should be answered in the affirmative. The solicitor has the authority under Act No. 130, supra, to take an affidavit and issue a warrant of arrest "in all criminal cases and make such warrant returnable to the court having jurisdiction of the offense." The offense referred to in your inquiry, and defined in Title 34, Section 90, Code of Alabama 1940, makes it a public offense for a husband without cause to neglect or fail to provide for the support of his wife and also makes it a public offense for a parent to neglect or fail to provide for the support and maintenance of his child or children under the age of eighteen years. Such offenses are described as misdemeanors, punishable by fine or imprisonment at hard labor in the county jail. In my opinion, this is a criminal case within the meaning of Act No. 130, supra, authorizing the solicitor to take affidavit and issue warrant of arrest returnable to either the probate court, juvenile court, or special court of domestic relations within the county. Title 34, Section 94, Code of Alabama 1940; see *St. John v. State*, 22 Ala. App. 115, 113 So. 321.

Your inquiry numbered four is also answered in the affirmative. The Code section referred to therein is Title 13, Section 366, Code of Alabama 1940, which provides a punishment as a misdemeanor for any parent, guardian or other person to contribute to the delinquency of a child under sixteen years of age, or cause such child to remain dependent, neglected or delinquent. The offense or act is described as a misdemeanor and is punishable by fine or imprisonment at hard labor for the county. Such, in my opinion, comes within the term "all criminal cases" as that term is used in Act No. 130, supra.

In answer to your inquiry numbered 5, it is my opinion that the various solicitors are not authorized to take affidavits and issue warrants of arrest in cases arising under Title 15, Section 60, Code of Alabama 1940, in that such affidavits and warrants are for the purpose of arresting a fugitive from justice from another state when the crime has been

committed in another state. This procedure is for the purpose of holding the fugitive until he can be extradited by a state other than Alabama. In such cases, the fugitive has not necessarily committed a crime in Alabama and the warrant issued could not be made returnable for the trial of a criminal case to any Alabama court.

It is my view that Act No. 130, *supra*, authorizes the solicitor to take affidavits and issue warrants of arrest only in those criminal cases which are to be tried in the State of Alabama. This Act provides that such warrant should be made returnable to a court having original jurisdiction of the offense charged. It is my view that the legislature in enacting such provision means courts of the State of Alabama having jurisdiction to try the criminal case.

In answer to your inquiries numbered 6A and 6B, it is my view that the solicitor is authorized in a felony case to take an affidavit and issue a warrant of arrest returnable to the proper court and that such warrant and affidavit is sufficient to afford a basis for the Alabama Governor to request extradition of the defendant from the State to which he has fled. The crimes in such cases are allegedly committed in the State of Alabama and such is a criminal case as that term is used in Act No. 130, *supra*. It would follow that the solicitor performs limited duties as a magistrate in such cases. See *In the Matter of Morris Strauss*, 197 U. S. 324, 49 L. Ed. 774; *Holloman v. State*, 37 Ala. App. 599, 74 So. 2d 612, cert. den. 261 Ala. 698, 74 So. 2d 614.

Although it has been held that an information and application for requisition sworn to before the clerk of a court of record and affidavits sworn to before a Florida county solicitor or notary public were not affidavits made before a magistrate as required by the Federal statute (Title 18, U. S. C. A., Section 3182) and would not afford a basis for the issuance of a request for extradition (*People ex rel. Lipshitz v. Bassenger, et al.* (1947), 75 N. Y. S. 2d 392, 273 App. Div. 19). Such holding has been criticized and overruled in the same jurisdiction (*Hollander v. Britt* (1949), 92 N. Y. S. 2d 662, 195 Misc. 722). In the last cited case it was held that the term "magistrate" refers to any public officer who is regarded as a magistrate under the law of the demanding state. Further, that the law of that state is controlling in determining whether that person before whom the affidavit was taken is a magistrate. The *Holloman* case, *supra*, is clear to the conclusion that a solicitor taking an affidavit and issuing a warrant of arrest as authorized by Act No. 130, *supra*, by whatever name called, is authorized to perform such acts and that such acts are a judicial function. See also, *Compton v. Alabama*, 214, U. S. 1, 53 L. Ed. 885, 29 S. Ct. 605, 16 Ann. Cas. 1095.

Yours very truly,
MACDONALD GALLION
Attorney General

October 13, 1960

Mrs. Bettye Frink
Secretary of State
Capitol

Holidays — Elections.

1. When a statute requires a Board to meet on a day certain, the fact that that day happens to fall on a legal holiday does not have the effect of postponing the convening of the Board nor invalidate acts performed by it on that day.
2. Election returns must be canvassed on the Friday next after an election as required by Title 17, Section 199, Code of Alabama 1940, even though that day happens to be a legal holiday.

Opinion by Assistant Attorney General Hall.

Dear Mrs. Frink:

Your request for an opinion dated October 6, 1960 is as follows:

"My attention has been directed to the fact that the Friday following the date of the General Election this year is November 11th, a legal holiday. In order that I may correctly advise the county election officials I shall appreciate your opinion on the following:

"Does the fact that the time for canvassing the returns of elections in the counties fixed by the opening phrase of Section 199, Title 17, Code of Alabama 1940, falls on a legal holiday this year, affect the application of the statute, or must the holiday be disregarded and the returns canvassed on the date set by said statute?

"Inasmuch as the election is only one month away an early reply will be appreciated."

Title 17, Section 199, Code of Alabama 1940, provides as follows:

"§ 199. Canvassing votes after an election; time and manner of. —Friday next after the election at the hour of twelve meridian, the returning officer of the county, in person or by deputy, and the judge of probate and the clerk of the circuit court shall assemble at the courthouse; and if there is no such judge or clerk, or if either of them fails to attend or if either of them is interested by reason of having been a candidate at such election, his place must be supplied by a respectable freeholder or householder of the county, appointed by the board hereinbefore provided for the appointing of the inspectors in the various precincts for said election at the time of appointing the election inspectors, and if said appointing board fails to provide for such member or members, or if any member or members as herein provided should fail to attend at the time and place herein mentioned, the returning officer shall supply such deficiency by a respectable freeholder or householder of the county

who is a qualified elector; and if all such officers are of the same political party, then the returning officer of the county must summon three reputable persons resident householders or freeholders of the county, members of the opposite political party who are qualified electors, to attend at such time and place; and in the presence of such other persons as choose to attend, the board shall make a correct statement from the returns of the votes from the several precincts of the county of the whole number of votes given therein for each officer, and the person to whom such votes were given."

Title 39, Section 184, Code of Alabama 1940, as amended by Act No. 760, Acts of Alabama 1951, page 1318, provides that certain days, including Armistice (Veterans) Day, shall be deemed a holiday. It will be noted that this section of the code is codified as part of the Title dealing with negotiable instruments.

Statutory holidays do not have the sacredness of the Sabbath, and any legal business may be transacted and any legal act performed upon a holiday other than that which is positively or by necessary implication forbidden by the terms of the statutory enactment. 50 Am. Jur., page 861, Sundays and Holidays, Section 77; **Hammons v. State**, 59 Ala. 164, 31 Am. Rep. 13.

A designation by statute of a day as a legal holiday does not invalidate official or judicial acts performed on that day, unless the statute expressly or by clear implication prohibits the performance of those acts. 50 Am. Jur., page 866, 1960 Cum. Supp., page 61, Sunday and Holidays, Section 82, n. 20.52; 26 ALR 2d 999.

Since courts may sit and pass judgment on legal holidays which are not considered as **dies non juridicus** [not a court day], likewise, official acts which are required by statute to be performed on a day certain must be done on that day, even though that day happens to be a legal holiday having the effect of postponing the doing of certain enumerated acts such as commercial transactions until the next business day. **Belmont Coal, etc., Co. v. Smith**, 74 Ala. 206-213; **Spence v. Spence**, 239 Ala. 480, 195 So. 717; **Smith v. State**, 243 Ala. 253, 9 So. 2d 122.

It will be noted that Title 17, Section 199, Code of Alabama 1940, provides for canvassing the election returns at the hour of twelve meridian on Friday next after the election, which is a day certain. Hence, Title 1, Section 12, Code of Alabama 1940, as amended by Act No. 668, Acts of Alabama 1953, page 926, is not here applicable. Quarterly Report of Attorney General, Vol. 97, page 15.

This office has previously ruled that when a statute requires a Board to meet on a day which happens to fall on a legal holiday, the statute must be observed. Quarterly Report of Attorney General, Vol. 11, page 56.

Therefore, it is my opinion that the canvassing of the returns must be made at the date and time specified in Title 17, Section 199, Code of Alabama 1940.

Very truly yours,
MACDONALD GALLION
Attorney General

October 17, 1960

Hon. Roy D. Gist, Chairman
Board of Revenue
Jackson County
Scottsboro, Alabama
Counties — Voting Machines

A resolution adopted by one board of county commissioners or other like governing body where no action has been taken on said resolution and the county has not assumed any liability thereunder is not binding on a successor board of county commissioners or other like governing body.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for an official opinion, bearing date of August 10, 1960, which is as follows:

"The Jackson County Board of Revenue is composed of five members, a chairman and four associate members who serve from four districts in Jackson County;

"The chairman and two associate members were not nominated in the May 1960 primaries, and will not be elected at the November 1960 General election.

"At a special call meeting held on Monday, August 1, 1960, the following resolution was adopted and recorded in the minutes of said board.

"Whereas, upon motion being offered by Jack Caperton and duly seconded by Glenn E. McGuffey that 45 voting machines be purchased in 1962 and delivered to Jackson County before the 1962 primary election and upon vote being taken said resolution was approved and this motion was adopted unanimously."

"There will be no order given, contract or agreement signed, binder or payment made on said machines, nor a purchase order issued by the chairman or board during this present term ending January 1961.

"Your official opinion upon the following question is hereby requested.

"Will the above resolution be binding, effective and mandatory upon the chairman and two associate members who could not vote upon the above resolution who will take office effective January 1961 to purchase 45 voting machines in 1962 at a cost of approximately \$90,000.00 without their vote or approval?"

My answer to your inquiry is in the negative.

You state as a fact in your request that no order will be given, contract or agreement signed, agreeing to bind the county in any way in connection with the voting machines here considered, nor will a purchase order be issued by the chairman of the board during the present term of office of the Jackson County Board of Revenue.

Assuming this fact to be true, it is my opinion that said resolution will not be binding upon the successor board. The successor board can act on said resolution if they see fit or they can change said resolution by repeal or otherwise.

Yours very truly,
MACDONALD GALLION
Attorney General

October 17, 1960

Hon. A. B. Foshee, Attorney
Board of Revenue and Control
Chilton County
Clanton, Alabama

Registers — Absentee Ballots — Compensation.

1. The Register in Chancery is entitled to receive not exceeding \$10.00 per day as compensation for handling absentee ballots regardless of the number of elections held on election day.
2. The following opinions of the Attorney General are hereby modified: Quarterly Report of Attorney General, Vol. 57, page 93; Quarterly Report of Attorney General, Vol. 65, page 14; Quarterly Report of Attorney General, Vol. 75, page 9; Quarterly Report of Attorney General, Vol. 82, page 14.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 28, 1960, is as follows:

"Has your office had occasion to interpret Title 17, Section 64(31) of the 1940 Code as amended? The Act states, 'The compensation hereby prescribed shall be the total compensation allowed the register for the performance of duties relative to absentee ballots in all elections held on the same day, and shall be paid from the county treasury, except in case of a municipal election held at a time different from a primary or general election, in which event payment shall be from the city or town treasury. Provided, no municipal employee shall be compensated for his services in this regard.'

"It is my interpretation of this latest amended provision that in the coming November election that the register could only charge \$10.00 per day even though there is a Constitutional Amendment Election and the General Election being held at one and the same time.

"If you have already ruled on this please send me a copy of your opinion. If you have not ruled on it, is it interpreted correctly by me?"

The provisions of Act No. 733, General Acts 1953, page 993, cited in your request as Title 17, Section 64(31), Code of Alabama 1940, is clear and unambiguous to the effect that the register in chancery is entitled to receive not exceeding \$10.00 per day as compensation for the performance of his services in handling absentee ballots. It is to be specifically noted that this act in no uncertain terms provides that compensation of not exceeding \$10.00 per day to be fixed by the county governing body shall be the total compensation allowed the register for the performance of duties relative to absentee ballots in all elections held on the same day.

You are, therefore, advised that your interpretation of this statute is correct.

The following opinions of the office of the Attorney General which were rendered prior to the amendment of the code section here considered, which are in conflict herewith, are hereby modified to conform to the ruling hereinabove expressed: Quarterly Report of Attorney General, Vol. 57, page 93; Quarterly Report of Attorney General, Vol. 75, page 9; Quarterly Report of Attorney General, Vol. 82, page 14.

Yours very truly,
MACDONALD GALLION
Attorney General

October 20, 1960

Honorable Estes R. Flynt
Judge of Probate
Lauderdale County
Florence, Alabama

Elections — Poll Tax — Voters.

1. Any person, whether formally registered or not, who was liable for poll tax in October 1, 1959, and did not pay such tax on or before February 1, 1960, and pays such poll tax on or after October 1, 1960, is not qualified to vote in the general election to be held on November 8, 1960.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of October 3, 1960 is as follows:

"As Probate Judge of Lauderdale County, Alabama, I am faced with several problems in regard to voting in the November general election on which I herewith request an opinion from the office of the Attorney General. The facts, situations and questions are as follows:

"1. A registered voter who was not 45 years of age prior to October 1, 1959, and failed to pay all poll tax for two years next preceding the dates of October 1, 1959, and February 1, 1960.

"Question:

"Would the above noted person be eligible to vote in the November, 1960, general election if his or her poll tax is paid between October 1, 1960, and November 8, 1960, both dates inclusive?

"2. A citizen resided in Lauderdale County, Alabama, for several years, is over the age of 21 years prior to October 1, 1959, and has never registered to vote and did not pay two years poll tax between October 1, 1959, and February 1, 1960.

"Question:

"Is he or she eligible to vote in the November 8, 1960 general election if he or she registered 10 days prior to said general election and paid two years poll tax between October 1, 1960, and November 8, 1960?

"3. A person moving into Alabama has two years residence requirement, but was not complete between October 1, 1959, and February 1, 1960, but has since fulfilled the required years to establish his or her residence requirements, and he or she was not 45 years of age before October 1, 1959.

"Question:

"Is such person eligible to vote in the November 8, 1960, general election if he or she registers to vote 10 days prior to the election and pays two years poll tax by November 8, 1960.

"In view of Constitutional Amendment of Section 178 XCVI ratified December 20, 1953, and Title 17, Section 137 of the Alabama Code, I would appreciate your clarification of the foregoing problems. Title 17, Section 137 of the Alabama Code in substance says that on February 1st of each year the several tax collectors shall furnish the Judge of Probate an alphabetical list of all persons who have paid poll tax since February 1st of the preceding year and said statement shall show for what year his poll tax was paid.

"In the foregoing fact situations, provided same are answered in the affirmative, what method should the Tax Collector use to certify to the Judge of Probate that the required poll tax has been paid to entitle a person to vote in the November 8, 1960, general election?"

I am of the opinion that each of your numbered questions should be answered in the negative. This obviates the necessity of answering your last question.

The Supreme Court in **In Re Opinion of the Justices**, 257 Ala. 712, 60 So. 2d 686, held that any person who was liable for poll tax on any given October first and did not pay the same by the succeeding February first could not become eligible to vote by paying such poll tax on or after the October first following the preceding February. In other words, the effect of this decision is that if a person is liable for poll tax and does not pay such poll tax by February first of any year, he cannot vote in any election held during that year. Sections 178 and 194, Constitution of Alabama 1901; **Finklea v. Farish**, 160 Ala. 230, 49 So. 366, **Ex Parte Bullen**, 236 Ala. 56, 181 So. 498; **Mitchell v. Kinney**, 242 Ala. 196, 5 So. 2d 788.

The voter referred to in your first and second questions was liable for poll tax on October 1, 1959, and did not pay same on or before February 1, 1960. He cannot now become eligible to vote in the general election by paying such poll tax after October 1, 1960, but before November 8, 1960.

This office in a letter opinion addressed to Hon. Conrad M. Fowler, Probate Judge, Shelby County, under date of October 3, 1960, held that Section 194 of the Constitution levied a poll tax on all **inhabitants** of the State between the ages of twenty-one and forty-five years. This opinion further held that persons who had lived in the State two years, but could not register because of the two-year residential requirements, were nevertheless liable for the poll tax for the two years they had been inhabitants of the State, unless otherwise exempt. The voter referred to in your third question was, under the holding of the Fowler opinion, liable for poll tax on October 1, 1959, and if such poll tax was

not paid on or before February 1, 1960, such voter could not become eligible to vote by paying poll tax on or after October 1, 1960. See Quarterly Reports of Attorney General, Vols. 50, p. 196 and 73, p. 81.

Yours very truly,
MACDONALD GALLION
Attorney General

November 10, 1960

Honorable Horsley White, Clerk
Circuit Court of
Chilton County
Clanton, Alabama

Clerks of Circuit Courts — Comptroller — Costs and Fees —
Fine and Forfeiture Fund — Preliminary Trials — Opinions
Overruled, Modified or Distinguished.

1. Circuit Clerk, Ex-Officio Clerk of Law and Equity Court, under Act No. 741, Acts of Alabama 1957, p. 1170, is entitled to a fee of five dollars (\$5.00) for preliminary hearing in felony cases.
2. The fee authorized under Act No. 741, supra, is collected in the same manner as fee of Clerk of County Court under Title 11, Section 91, Code of Alabama 1940, from fine and forfeiture fund except defendant need not subsequently be convicted.
3. Quarterly Report of Attorney General, Volume 36, page 32, overruled by Act No. 741, supra. Quarterly Report of Attorney General, Volume 19, page 246, modified by this opinion.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion, bearing date of September 28, 1960, is as follows:

"I have submitted a cost bill to the State Comptroller involving cost in a preliminary hearing under Title 11, Section 89(2) which has provided a flat fee of \$5.00 for clerks of Circuit Courts who are ex officio clerks of County Courts, Law and Equity Courts, etc., on preliminary hearings in felony cases.

"Under Title 45, Section 69, there is a fee of not to exceed \$5.00 for cost in preliminary hearing. The Comptroller has returned my cost bill with a notation stating that I would have to itemize the cost in a preliminary hearing before it would be allowed and paid. There is no itemization, as this is a flat fee.

"Please advise me whether or not the \$5.00 for preliminary hearing is a proper charge against the State of Alabama without itemization."

A circuit clerk, as ex-officio clerk of the law and equity court, county court, or court of like jurisdiction, is authorized a five-dollar fee on preliminary hearing in felony cases under the provisions of Act No. 741, Acts of Alabama 1957, page 1170 (Title 11, Section 89(2), Code of Alabama 1940, as amended).

Prior to the passage of Act No. 741, *supra*, this office has held in Quarterly Report of Attorney General, Volume 36, page 32, that the clerk of the circuit court when acting as ex-officio clerk of the law and equity court, being subject to the same provisions applicable to circuit clerks under the general law, was under no duty to render services in preliminary hearings held before the judge of the court acting as a committing magistrate and, therefore, there was no provision of law by which he could be entitled to any fees for his acting as such. This opinion, of course, has been expressly overruled by the provisions of Act No. 741, *supra*, above.

In my opinion, the fee authorized under Act No. 741, *supra*, is the same type of fee and in the same nature as that fee authorized to the clerk of the county courts under Title 11, Section 91, Code of Alabama 1940, and should be governed by the same law applicable thereto. In Quarterly Report of Attorney General, Volume 35, page 55, this office held:

"In reference to the \$2.00 fee provided for clerks on preliminary hearings, it is my opinion that where the defendant has been subsequently indicted and convicted, such fee is payable to the clerk from the fine and forfeiture fund of the county. Title 11, Section 91, Code of 1940, the statute authorizing such fees, provides that it shall be payable as other items of cost incurred by the State. There is no provision for the payment of this fee by the State from the convict fund under Title 45, Section 69, Code of 1940, and, therefore, payment thereof must be from the fine and forfeiture fund of the county. See Quarterly Report of the Attorney General, Volume 9, page 9."

As also stated in the above opinion, the purpose of the provision of Title 45, Section 9, Code of Alabama 1940, as amended (Act No. 542, Acts of Alabama 1957, page 762), providing a payment for the cost of the committing magistrates and constables on preliminary trial, both together not to exceed five dollars (\$5.00), as to make some provision for the payment of cost of certain persons participating in preliminary hearing, that is, committing magistrates, constables and witnesses, who, without such provision, would have no other resource for the collection of their costs. This opinion also overruled an opinion of the Attorney General, Quarterly Report of Attorney General, Volume 8, page 240, which had held that the clerks of the county court not receive their

fee under Title 11, Section 91, from the fine and forfeiture fund. Inasmuch as Quarterly Report of Attorney General, Volume 19, page 246, also follows this line of thought, the same is herewith expressly modified to comply with the opinion stated in Quarterly Report of Attorney General, Volume 35, page 55, above mentioned.

It is, therefore, my opinion that the fee authorized in Act. No. 741, supra, is collectible only from the county fine and forfeiture fund, or its legal equivalent, and in the same manner as the fee authorized for the clerks of the county courts in Section 91, supra, with the following notable exception, this being that Section 91 requires that the defendant be subsequently convicted and sentenced in order for the clerk to collect his fees. Act No. 741, supra, has no such requirement.

Very truly yours,
MACDONALD GALLION
Attorney General

November 23, 1960

Honorable Sherman W. Clark
Assistant Agency Counsel
Federal National Mortgage Association
41 Exchange Place, S. E.
Atlanta 3, Georgia

Filing Tax.

Mortgage filing tax is due on the recording of a transfer of a mortgage from an exempt Federal instrumentality to a nonexempt person, corporation, organization, or institution based upon the then unpaid balance of the secured debt.

Opinion by Assistant Attorney General Loeb.

Dear Mr. Clark:

Your request for an official opinion, dated August 2, 1960, is as follows:

"This Association which is a Federal government agency organized and existing by virtue of the National Housing Act, as amended, is engaged as you know in the operation of a National Secondary Market for the purchase and sale of mortgages in order to provide a measure of liquidity for mortgage financing, and to carry out the other directives included in such legislation. In the course of our business we acquire by purchase home mortgages and hold and own such mortgages in our portfolio. From time to time mortgages from our portfolio are sold and transferred to other investors.

"In the course of our business we have recently transferred by assignment in exchange for certain outstanding treasury securities a rather large number of mortgages. This was the Bond Exchange Program authorized under Federal law. A number of these mortgages evidenced by a photostatic copy of the assignment thereof and herewith enclosed were transferred to the Flushing Federal Savings & Loan Association.

"We are in receipt of two letters written by the Judge of Probate of Calhoun County, Alabama, dated June 25, 1960 and July 8, 1960, copies of which are enclosed evidencing a refusal by the Judge of Probate to record our assignments without payment of the mortgage tax under Alabama law as cited in such letters.

"It seems to us that the opinion dated August 28, 1934, does not cover the situation here. As a government agency we should have the right to assign our mortgages of record without the payment of the Alabama transfer tax. We own thousands of mortgages in the State of Alabama. The question accordingly arises whether this Association's responsibilities under Federal statutes to establish and operate the above described Secondary Market are subject to taxes in any respect under state law. It is, of course, admitted that if originators of mortgage indebtednesses are not exempt by State or Federal law that the tax should be paid by such originators.

Such property, however, having passed to Federal government ownership by purchase by this Association becomes Federal property and in our view exempt property so far as payment of state transfer taxes are concerned. It is quite conceivable that our operations will be substantially and negatively affected if purchasers of our mortgages are obligated for the first time to pay this tax. In our view this was not the intention of the Alabama transfer statutes.

"It would be appreciated if you would further analyze this problem and advise us whether or not in this instance the Judge of Probate is correct in his letters or whether more properly the Alabama statutes do not apply to the instant case. The rule on the question should cover also other and similar instructions for the transfer of mortgages which constitutes the business of this Association so far as our sales are concerned."

On October 4, 1960, the following additional facts were submitted by you:

"Mr. Hackett, our Agency Counsel and I, appreciate talking with you on the telephone October 3rd relative to the above subject, and your expression of willingness to advise us thereon in response to this letter.

"We previously addressed a letter dated August 2, 1960 and a short follow-up letter of a more recent date to Hon. MacDonald Gallion,

Attorney General of Alabama, but have not yet received a response thereto mainly, we presume, because the letter should really have been addressed to you. A copy of our letter dated August 2 is herewith enclosed.

"This Association is a government agency organized and existing by virtue of Chapter III of the National Housing Act, as amended, and as such we are charged by Federal law with the operation of a National secondary market for VA guaranteed and FHA insured first mortgages. We are also charged with other responsibilities with reference to special assistance mortgages and for the management and liquidation of previous government portfolios on first mortgages. As such a government agency we own and hold many thousands of mortgages in the eight states administered to by this agency and a number of thousands of such mortgages in the State of Alabama. We do not originate mortgages here but purchase and sell mortgages originated by the banks and other financial institutions who meet the government mortgage financing standards and whose relationship to us both in the sale and servicing of mortgages is covered by contract. Some of these institutions are exempt by virtue of the Alabama statutes relative to transfer taxes or mortgages. A specific instance of the type of activity in which we are engaged is the transfer of a number of mortgages by assignments from this Association to Flushing Federal Savings & Loan Association of Flushing, N. Y., dated June 15, 1960, 53 mortgages, included in one instrument of assignment. This transaction was a part of a transfer in connection with the so-called Bond-Swap Program authorized by the Secretary of Treasury in which a number of our VA Sect. 501 first mortgages were exchanged for certain non-negotiable government long-term bonds held by private investors. Almost all of the mortgages on this particular assignment were originated by exempt institutions. We delivered our assignment to Flushing in the closing of the transaction with them.

They, in turn, of course, submitted the assignment to the Judge of Probate of Calhoun County, Mr. G. C. Brittain, Anniston, Alabama, for recording together with the recording fees. The Judge thereupon advised Flushing that since the transfer taxes were not paid on the original mortgages that taxes in the sum of \$472.80 on 52 of these mortgages would have to be paid by way of transfer taxes calculated on the then present balances due thereon. He cited a 1934 opinion of the Attorney General of Alabama dated August 28, 1934, in which it is stated in part that mortgages executed by a Federal Savings & Loan Association are not exempt from the payment of Alabama State Transfer Taxes.

"Our position as stated in part in the August 2nd letter referred to is simply this:

"1. Upon transfer of any of the mortgages owned and held by this Association, the Association as a government agency is accomplish-

ing the transfer. The transferee is not the moving party to accomplish such a transfer.

"2. The Association as a government agency is exempt from the Alabama State Transfer Taxes.

"3. The Association as a Federal Agency is charged with the necessity under Federal law to own and hold first mortgages and to deal in such mortgages both in the purchase and sale thereof. While private institution or institutions which are not exempt are fully liable for the payment of transfer taxes under Alabama law, this Association as a Federal Association is not, of course, liable for such taxes.

"4. It is our thought that if and when at some future date the above transactions, and in any event in any transaction of mortgages at one time previously held and owned by this Association, should become the property of a non-exempt institution that any transfer made by some non-exempt institution would be subject to the transfer tax if the tax had not been previously paid.

The matter is not simply a question of the immediate transaction but may conceivably affect many of our mortgages, perhaps thousands of them, which were originated by exempt institutions. I think as a Federal agency we should be exempt from paying Alabama transfer taxes on any of these transfers made by us. Of course, we realize that these taxes are made payable upon the recording of a transfer instrument. We think, however, that upon the transfer itself the tax, if any, is due and payable whether the transfer instrument is recorded or not; and we think too, as you no doubt will agree, that the payment of transfer tax upon the recording of the instrument is a provision of law designed to effect collection and is not the criterion upon which the obligation to pay the tax is based.

We would appreciate very much your analysis of this problem for us from the point of view of the State of Alabama and the responsibilities of the various Judges of Probate; and also, as it relates specifically to the above-mentioned Flushing case."

It seems clear that Federal National Mortgage Association is an instrumentality of the Federal Government created by act of Congress and immune from taxation by virtue of the language of such act. Title 12, Section 1723 (c), U. S. C. A.; Quarterly Report of the Attorney General, Volume 19, page 291. It is equally apparent that Flushing Federal Savings and Loan Association is not such an instrumentality and would be subject to state taxation. Quarterly Report of the Attorney General, Volume 74, page 18; Quarterly Report of the Attorney General, Volume 60, page 40; Quarterly Report of the Attorney General, Volume 16, page 252; Biennial Report of the Attorney General 1934-36, page 147; Biennial Report of the Attorney General 1932-34, page 639.

The fact situation indicates that the mortgages here in question were either executed directly to Federal National Mortgage Association or previously transferred to it and subsequently assigned by it to Flushing Federal Savings and Loan Association. The mortgage privilege tax levied by Section 619, as amended, Title 51, Code of Alabama 1940, has never been paid since the mortgages were either originally executed to a tax exempt instrumentality or executed to one exempt instrumentality and assigned to another.

The precise question that now arises, is whether the present assignment of those mortgages when executed by a tax exempt Federal instrumentality to a non tax exempt instrumentality is subject to the mortgage privilege tax imposed by Section 619, as amended, Title 51, Code of Alabama 1940. The portions of this section, insofar as pertinent, read as follows:

“(e) . . . Upon the filing for record of any instrument which has been exempted by law from the payment of the tax provided for in this section, the Judge of Probate shall certify thereon that no tax has been paid and shall stamp in bold letters on the face of said instrument ‘No Tax Collected’ and said certificate shall be recorded with and as a part of such instrument, and thereafter such instrument shall be received for record in any county in this state without the payment of any further tax thereon, when submitted by the same tax exempt institution or another tax exempt institution, but if submitted by or transferred to an institution or person not exempt from the payment of the tax levied under this section, the judge of probate shall collect the tax levied by this section, upon the then unpaid balance of the secured debt together with the fee of the judge of probate for recording such instrument, before it will be admitted to record. . . .”

“§ 619 (3). **Tax upon recording transfer of instrument recorded by exempt institution.**—If any mortgage, deed of trust, contract of conditional sale or other instrument of like character heretofore or hereafter filed for record in any probate office of this state which was or shall be given to secure the payment of any debt incurred to a corporation, organization or institution now or hereafter exempt by law from the payment of the recording privilege tax imposed by title 51, Section 619 of the Code of Alabama 1940 and upon which such recording privilege tax has not been previously paid, has been heretofore or be hereafter transferred to a person, corporation, organization or institution not exempt from payment of such tax and such transfer be presented for record within this state, such transfer shall be received for record upon payment of the privilege tax imposed by said section upon the then unpaid balance of the secured debt and the recording fees of the probate judge.”

“§ 619 (5). **Such transfers not subject to tax imposed by § 618.**—No such transfer hereafter filed for record shall be subject to the

recording privilege tax imposed by Title 51, Section 618 of the Code of Alabama 1940."

As held many times before, the recordation of a mortgage made directly to a tax exempt Federal instrumentality is not subject to the privilege tax. **Pittman v. Home Owners' Loan Corporation of Washington, D. C.**, 308 U. S. 21, 60 S. Ct. 15; **Federal Land Bank of New Orleans v. Crosland**, 261 U. S. 374, 43 S. Ct. 385; Quarterly Report of the Attorney General, Volume 19, page 291; Quarterly Report of the Attorney General, Volume 17, page 176; Quarterly Report of the Attorney General, Volume 14, page 146. Nor is an assignment of such mortgage by a tax exempt Federal instrumentality to another tax exempt Federal instrumentality subject to the privilege tax. Quarterly Report of the Attorney General, Volume 19, page 291. However, when the Federal instrumentality executes an assignment to a person or institution not exempt from tax, then such assignment is recorded for the benefit and protection of the assignee who is subject to tax. Quarterly Report of the Attorney General, Volume 52, page 144, Biennial Report of the Attorney General, 1936-38, page 729. Such non-exempt person or institution cannot claim for itself an exemption from taxation properly belonging to another. As soon as the assignment of the mortgage is executed, the Federal instrumentality ceases to have any direct interest in the recordation thereof, and though it may well be true that the cost of such recordation may ultimately be borne by the Federal instrumentality, still the tax is levied upon the person or institution for whose benefit such instrument is recorded, and it is to this person that the State looks for payment thereof.

The analogy between the facts here and the situation that exists with reference to sales tax when an independent contractor in fulfilling a contract with the Federal Government purchases materials from a vendor is too strong to be overlooked. In that event, even though the Federal Government would admittedly be exempt from taxation, the contractor is held liable for sales tax on all purchases of materials used in carrying out the contract. This rule is expressed most clearly in the following language quoted from the case of **Curry v. United States**, 314 U. S. 14, 62 S. Ct. 48, at page 49:

"For the reasons stated at length in our opinion in the **King & Boozer** case we think that the contractors, in purchasing and bringing the building material into the state and in appropriating it to their contract with the Government, were not agents or instrumentalities of the Government; and they are not relieved of the tax to which they would otherwise be subject, by reason of the fact that they are Government contractors. If the state law lays the tax upon them rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual only as the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the **King & Boozer** case, by concession of the Government and on authority,

the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government."

That Section 619, as amended, Title 51, Code of Alabama 1940, contemplates the mortgagee or assignee being held liable for payment of the tax is shown by repeated references to "presentation" of such instrument "by the owner of any such instrument" or his agent or attorney, and by the requirement, under certain circumstances, that the owner of the instrument, his agent or attorney present a petition to the Department of Revenue for proper determination of the tax. Further evidence of this intent is expressed in the following language of section 619 (e), *supra*:

"Upon the filing for record of such mortgage, deed of trust, contract of conditional sale or other instrument of like character, **the person to whom the same shall be made payable**, or his agent shall present the said instrument to the judge of probate of the county in which the property conveyed thereby, or any part thereof, is situated and shall pay to the probate judge the amount of tax required under this section. . ." (Emphasis supplied).

Finally, there is the repeated provision in said statute that upon payment of the filing tax, no ad valorem tax shall be collected on the instrument or the debt secured thereby. The only person who could possibly benefit by this legislative exemption from ad valorem tax would be the present owner of the property or instrument conveying such property and not the person executing the instrument. Therefore, it seems clear that the Legislature intended for the burden of the tax to fall on the assignee or mortgagee.

Even though it be assumed for the purpose of our present inquiry that the Alabama statute imposes a general tax on mortgages (as was held by the Supreme Court of the United States in **Federal Land Bank v. Crosland**, *supra*), rather than on the privilege of recording same, still this argument is not persuasive because what we are here dealing with is not the mortgage itself (which would be exempt) but with the assignment of that mortgage by Federal National Mortgage Association to a non-exempt person, and it is this person, the assignee, who must pay the tax and whose status determines his tax liability. Quarterly Report of the Attorney General, Volume 52, page 144; Quarterly Report of the Attorney General, Volume 27, page 104; Biennial Report of the Attorney General 1936-38, page 729.

In conclusion, it is my opinion that the assignment under consideration here is subject to the mortgage tax levied by Section 619, *supra*, and that this would be true regardless of who actually offers such instrument for record. I regret that we cannot agree with your conten-

tions in this matter; however, we feel that the above opinion expresses the correct interpretation under existing law.

Any former opinions of this office holding contrary to the above are hereby overruled or modified accordingly.

Very truly yours,
MACDONALD GALLION
Attorney General

December 15, 1960

Honorable Harry H. Haden
Commissioner
Department of Revenue
Montgomery 2, Alabama

Taxation — Sales Tax — Colleges and Universities

1. State colleges and universities operating dining halls where meals are served to students must collect and pay to the State Department of Revenue sales tax on the furnishing of such meals pursuant to provisions of Act No. 100, Second Special Session 1959, page 298.

2. Any former opinions of this office holding contrary to the above are overruled or modified accordingly.

Opinion by Assistant Attorney General Loeb

Dear Sir:

Your request for an official opinion bearing date of December 5, 1960, is as follows:

"Various State universities and colleges in the State of Alabama, such as the University of Alabama and Auburn University, maintain and operate dining halls where meals, including breakfast, lunch and dinner, are served to students attending these universities and colleges. The students usually pay for these meals on a monthly basis rather than a per meal basis. It is my understanding that the students are charged for room and board in one bill, with the board or meals and the room charge being separately itemized.

"I would appreciate your official opinion as to whether or not such transactions with respect to the meals are subject to the sales tax provided for by Sales Tax Act No. 100, adopted at the Second Special Session of the Alabama Legislature in 1959."

In a former opinion of this office reported in Volume 86, page 40, we held that the University of Alabama, an agency or instrumentality of the State of Alabama, is not required to collect or pay to the State

Department of Revenue sales tax in connection with the operation of its cafeterias. This conclusion was based partly upon the language contained in the sales tax law then in existence (Title 51, Sections 752 et seq., Code of Alabama 1940) and partly upon the opinion of the Supreme Court in **City of Anniston v. State of Alabama**, 265 Ala. 303, 91 So. 2d 211, the theory being that since the University of Alabama was not mentioned specifically in the levying section, except in regard to certain athletic contests, it could not be required to collect the tax. Subsequently, the Legislature passed Act No. 395, Regular Session 1957, page 547, approved September 4, 1957, which amended the levying section to include "the University of Alabama, Alabama Polytechnic Institute and all other institutions of higher learning in the State, whether such institutions be denominational, state, county or municipal institutions . . ."

In enacting the new Sales Tax Act (Act No. 100, Second Special Session 1959, page 298, effective October 1, 1959), the Legislature used the following language in the levying section:

"(a) Upon every person, firm, or corporation, (including the State of Alabama and its Alcoholic Beverage Control Board in the sale of alcoholic beverages of all kinds, the University of Alabama, Alabama Polytechnic Institute and all other institutions of higher learning in the state, whether such institutions be denominational, state, county or municipal institutions, and any association or other agency or instrumentality of such institutions) . . ."

From this language one can readily determine the legislative intent that all sales made by the State of Alabama, the University of Alabama, Auburn University or any other college or university in the State be subject to the sales tax imposed by said Act. It is, therefore, my conclusion that based upon the express language used in Section 2(a) of Act No. 100, *supra*, all sales of meals made to students by dining halls operated by State universities and colleges are subject to the sales tax provided for in said Act.

Any former opinions of this office holding contrary to the above are hereby overruled or modified accordingly.

Very truly yours,
MACDONALD GALLION
Attorney General

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